Special Double Issue

Full Text: Prof. Alexander Meiklejohn's Historic Testimony on the First Amendment

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Showdown Coming: Is Dulles or Eisenhower to Make U.S. Foreign Policy?

What Really Happened at Geneva

It may be that Dulles told his Western colleagues that if only they said "nyet" to the bitter end, they would be rewarded at the penultimate hour by a Russian surrender on the German question. If so, they have been led into a blind alley. Molotov would not budge; he was intransigeant. This is the refrain of the journalistic chorus which responds to every motion of the State Department baton. But nobody stops to consider that we, too, did not budge; that we, too, were intransigeant. We insisted that we would accept nothing else but a rearmed and reunited Germany allied with us against the Soviet bloc. A Russian rejection was expected. Would we agree to release Western Germany in order that it might join the Warsaw pact? Yet such is the imbecility to which American opinion has been reduced by our own propaganda that Walter Lippmann seems to be the only major commentator who sees the obvious. Geneva, on this basis, had to fail.

From the standpoint of world opinion, the Russians emerge with a better position. We wanted a rearmed Germany allied with the West; they, a neutralized Germany. From the standpoint of the Germans, the failure leaves them no recourse but direct negotiations with Moscow. From the standpoint of America, this may prove disastrous. The German right is friendly to a Russian deal. To harden the lines of the cold war again is to lay the groundwork for a new Russo-German entente; what this would do to the world balance of power is comparable only to the Chinese upheaval.

The Geneva balance sheet totes up against us. The Russians were ready to accept inspection if we accepted arms reduction and the outlawing of the bomb; we were serious only about that glamorous Madison Avenue phoney—aerial inspection. This would have given us a map of Russian installations, free of charge as it were, with no commitment in return. As for Item Three, the Russian proposals fell far short of the utopian, but could one expect their curtain to be raised overnight? Their proposals involved a freer interchange; these were rejected for the sake of the counter revolutionary muezzins of Radio "Free Europe." Rather than make *some* progress toward a world without barriers, the State Department prefers to see nailed down again the curtain which has been slowly rising. The Russians would be playing into the hands of their worst enemies if they turned back into isolation and the room without windows which was Stalin's Russia.

The Repercussions in Washington

Dulles fought hard against the meeting "at the summit" and has succeeded in undoing its fruits. His success in achieving a failure has released an anvil chorus here, not only in the right wing of the Republican party and in the military circles which want more spending money, but even in the "liberal" wing of the Administration. For example, that "top level administration leader" who was quoted by the Associated Press as saying that the cold war and a cold war budget are back again was Nelson Rockefeller, exploiting the turn to put in a plug against the Treasury for more aid abroad. The rightists and the military are talking jubilantly of another "hundred years' war" in which they can write their own ticket at the Budget Bureau. The outcome must lead to a showdown, and the best news of the week was Constantine Brown's column in the Washington *Evening Star* last Wednesday headlined, "Dulles May Be The Scrapegoat. Ouster Would Be Politically Expedient In Light of Failure of Geneva Talks." Brown, very much in the cold war camp, says the President's "immediate entourage" (Sherman Adams?) is hostile to Dulles. The contrasting calm on Geneva and friendlier attitude taken by Defense Secretary Wilson at his press conference last week is most significant. Wilson and Humphrey are the pro-peace core of the Administration. Is Dulles to determine policy, or Eisenhower? If Dulles, then there can be no balanced budget, no tax reduction and no peace appeal—in 1956. My own hunch is that the outcome will be the downgrading of Dulles; this failure makes it more likely that Eisenhower will run again. I believe the President deeply desirous of cementing peace, and that we will yet see a new Geneva without either Dulles or Molotov; both these "old Bolsheviks" are stale.

What About The Stevenson Candidacy?

If only Eisenhower had Stevenson's ability—or Stevenson the General's shiny stars! A General Adlai Eisenhower in the White House, leading a conservative big business party, could *really* negotiate a settlement. Stevenson, like George, would like to negotiate, but how far could he go with the Democratic party as it is, and the Republican right ready to cry "treason" at any give-and-take? So long as the Republicans are in power, they are forced to muzzle their own McCarthies and Knowlands in self-protection. Once out of power, the right will be unleashed again. The ideal solution would be another four years of Ike without Dulles or Nixon and with a Democratic Congress, led in foreign policy by George—or the same combination with Warren. But November's choices may be far from ideal.

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A Different Kind of Hearing Opens Where McCarthy Long Performed

It is a pity the TV cameras could not have been focussed last Monday on Room 318 in the Senate Office Building, the famous caucus room, with its high marble walls and red drapes. There almost six years ago McCarthy rose to a sinister prominence by his charges against Owen Lattimore and the State Department. There three years later he began to terrorize the nation's intellectuals and public servants as chairman of the Senate Government Operations Committee. In the same room last year, while the entire country watched on the TV screens fascinated, he lost his battle with the Army and fell from public favor; too many, observing him at close range, saw him at last for what he was.

The scene in that room last Monday was a measure of the change which has taken place. The occasion was a new Senate investigation, but this time into violations of constitutional liberties. At the committee table, its chairman, Hennings of Missouri, was flanked by O'Mahoney of Wyoming, himself a portent. For O'Mahoney had been re-elected to the Senate after appearing as co-counsel with Thurman Arnold in the successful defense of Owen Lattimore against trumped up perjury charges growing out of the long campaign against him by McCarthy and McCarran. O'Mahoney's election and the Hennings inquiry demonstrated that it had become politically feasible to defend the Bill of Rights.

Before the cameras as the hearing opened was one of McCarthy's favorite targets, a college professor. But this one, this time, was being listened to with respect. There sat a tall thin man, with a long scholarly face and a thin fringe of hair, speaking in a cultured New England accent, of the First Amendment and its true interpretation, with an eloquence and a vibrancy amazing in a man of 83. The witness was Alexander Meiklejohn, eldest of living American philosophers, once president of Amherst, later famous for his work at Wisconsin, a follower of Kant, for whom the defense of fundamental American liberties was a categorical imperative. Needless to say, no rancorous voice dared break in to say, "But, Professor, were you now or have you ever been . . .?"

Beside him, waiting to testify next, was an old friend and friendly antagonist, the famous Zechariah Chafee of Harvard. Where Chafee, himself one of the most famous American civil libertarians, accepts the "clear and present danger" restriction on free speech, Meiklejohn is a "fundamentalist," arguing (as may be seen on the next page) that a man may say what he likes so long as it is not an incitement to crime. Chafee's statement, from which we print some excerpts, had little that is not familiar to readers of his classic work, "Free Speech in The United States" and stopped (like the book) at Pearl Harbor. A man of such wit and insight owes it to himself and the rest of us to bring himself and his book up to date; there is work to be done worthy of the Harvard professor who defended the rights of Wobblies and Socialists a generation ago, when that took nerve.

O'Connor Loses First Round

The right of a Senate committee not only to investigate the books in the government's overseas libraries but the ideas in the heads of their authors was upheld by Federal Judge Joseph C. McGarraghy last Tuesday in denying a defense motion for the acquittal of Harvey O'Connor.

The Judge, citing the Barsky and Hollywood Ten cases, held that such inquisition was a justifiable abridgment of the First Amendment. The defense contention that O'Connor was within his rights to refuse to answer whether he was a member "of the Communist conspiracy" because that was too dangerously vague was brushed aside. The Judge said "defendant had no difficulty in understanding what was meant by 'communist conspiracy' at the time of the contempt, for he refused to answer the question." Presumably, by this standard of logic, if he had answered the question, that would have proved that he did not understand it!

The Judge's ruling on the First Amendment sets the stage for a higher court test, and seems to obviate the possibility (though this is not absolutely certain) of an acquittal on some technicality.

Bi-Partisan Whitewash Being Prepared for Security Program

Months ago we pointed out that Senator Humphrey's bill for a 12-man bipartisan commission to investigate the security program was made to order for a whitewash by Brownell and J. Edgar Hoover. The appointments confirm the warning. As the ADA and the *Washington Post* were quick to point out, not a single person—"no Learned Hand, no John Lord O'Brian, no Erwin Griswold"—associated with the defense of civil liberties was appointed to the Commission.

The four men picked by "the White House," i.e. by the Attorney General, include two Administration figures who will be investigating the security program they themselves administer and a former Democratic Attorney General, McGranery, "who shares responsibility" as the *Washington Post* said "for some of the worst excesses of the security program." The four men picked by Nixon include two Senators, both right wingers, Stennis of Mississippi and Cotton of New Hampshire.

That the eight men to be picked by the Administration would be of this kind was to be expected. It is disappointing to find that the four men named by the Democrats, through the Speaker of the House, Rayburn of Texas, are no better. Rayburn picked Chairman Walter of the House Un-American Activities Committee and three nonentities. Wan, indeed, seems the hope expressed by the *Washington Post* that these men will be "relentless" in examining FBI files and security records. They seem hand-picked to make sure that they would "relent." The one hopeful observation is that this Commission represents a rear guard action; the witch hunt is on the defensive.

Suppressed Dispatch*

"London, Eng., Nov. 7 (AP)—American money indirectly provided the down payment for Communist arms Egypt is buying from Czechoslovakia, the London Daily Mail reported today in a dispatch from Saudi Arabia.

"The Daily Mail said that Egypt was short of cash when time came to make the first payment to Czechoslovakia. It was then, the newspaper said, that Egypt turned to Saudi Arabia for a loan. Saudi Arabia, in turn, borrowed the sum of $3,000,000 from the Arabian-American Oil Co. (Aramco) and sent it to Premier Nasser of Egypt.

"The report pointed out that Aramco might not have known the purpose of the loan but added 'you cannot get away from the fact that American money helped buy Communist arms.'"

*** So far as we know, this Associated Press dispatch was not published in any American paper, though it went over the AP wires.**

A memorial meeting for Eugene Debs will be held Monday night, November 28 at the Fraternal Clubhouse, 110 W. 48th Street, New York City, sponsored by the *National Guardian*, the *Monthly Review*, the *American Socialist* and this *Weekly*. James Aronson will be chairman; the speakers: W. E. B. du Bois, Leo Huberman, Bert Cochran, Clifford McAvoy, and IFS.

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Prof. Alexander Meiklejohn's Historic Defense of the First Amendment

"Loyalty Does Not Imply Conformity of Opinion"

The Weekly is proud to make available here in full text the classic defense of the First Amendment with which the venerable 83-year-old Prof. Alexander Meiklejohn, dean of American philosophers, and most uncompromising of American libertarians, opened the historic hearings begun last Monday by the Hennings subcommittee of the Senate on constitutional liberties.

Mr. Chairman and Members of the Committee:

I deeply appreciate your courtesy in asking me to join with you in an attempt to define the meaning of the words, "Congress shall make no law . . . abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances." Whatever those words may mean, they go directly to the heart of our American Plan of Government. If we can understand them we can know what, as a self-governing nation, we are trying to be and to do. Insofar as we do not understand them, we are in grave danger of blocking our own purposes, of denying our own beliefs.

It may clarify my own part in our conference if I tell you at once my opinion concerning this much-debated subject. The First Amendment seems to me to be a very uncompromising statement. It admits of no exceptions. It tells us that the Congress and by implication, all other agencies of the Government are denied any authority whatever to limit the Political Freedom of the citizens of the United States. It declares that with respect to political belief, political discussion, political advocacy, political planning, our citizens are sovereign, and the Congress is their subordinate agent. That agent is authorized, under strong safeguards against the abuse of its power, to limit the freedom of men as they go about the management of their private, their non-political affairs. But the same men, as they endeavor to meet the public resposibilities of citizenship in a free society, are in a vital sense, which is not easy to define, beyond the reach of legislative control. Our common task, as we talk together today, is to determine what that sense is.

Mr. Chairman, in view of your courtesy to me, I hope you will not find me discourteous when I suggest that the Congress is a subordinate branch of the Government of the United States. In saying this I am simply repeating in less passionate words what was said by the writers of the Federalist papers when, a century and three-quarters ago, they explained the meaning of the proposed Constitution to a body politic which seemed very reluctant to adopt it. Over and over again the writers of those papers declared that the Constitutional Convention had given to the People adequate protection against a much-feared tyranny of the Legislature. In one of the most brilliant statements ever written about the Constitution, the Federalist says:

"It is one thing to be subject to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government, and, whatever may be the forms of the Constitution, unites all power in the same hands." (No. 71).

They Feared Congress

It is chiefly the legislature, the Federalist insists, which threatens to usurp the governing powers of the People. In words which unfortunately have some relevance today, it declares that "it is against the enterprising ambition of this department that the people ought to indulge their jealousy and exhaust all their precautions." And, further, the hesitant people were assured that the Convention, having recognized this danger, had devised adequate protections against it. The Representatives, it was provided, would be elected by vote of the People. Elections would be for terms brief enough to ensure active and continuous popular control. The legislature would have no law-making authority other than those limited powers specifically delegated to it. A general legislative power to act for the security and welfare of the nation was denied on the ground that it would destroy the basic postulate of popular Self-Government on which the Constitution rests.

As the Federalist thus describes, with insight and accuracy, the Constitutional defenses of the Freedom of the People against legislative invasion, it is not speaking of that freedom as an "Individual Right" which is bestowed upon the citizens by action of the Legislature. Nor is the principle of the Freedom of Speech derived from a Law of Nature or of Reason in the abstract. As it stands in the Constitution, it is an expression of the basic American political agreement that, in the last resort, the People of the United States shall govern themselves. To find its meaning, therefore, we must dig down to the very foundations of the Self-Governing process. And what we shall there find is the fact that when men govern themselves, it is they—and no one else—who must pass judgment upon public policies. And that means that, in our popular discussions, unwise ideas must have a hearing as well as wise ones, dangerous ideas as well as safe, unAmerican as well as American. Just so far as, at any point, the citizens who are to decide issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment is directed. That provision neither the Legislature, nor the Executive, nor the Judiciary, nor all of them acting together, has authority to nullify. We Americans have, together, decided to be politically Free.

Mr. Chairman, I have now stated for your consideration the thesis that the First Amendment is not "open to exceptions" that our American "freedom of Speech" is not, on any grounds whatever, subject to abridgement by the Representatives of the People. May I next try to answer two arguments which are commonly brought against that thesis in the courts and in the wider circle of popular discussion?

Can Speech Threaten Freedom?

The first objection rests upon the supposition that freedom of speech may on occasion threaten the security of the nation. And when these two legitimate national interests are in conflict, the government, it is said, must strike a balance between them. And that means that the First Amendment must at times yield ground. The freedom of speech must be abridged in order that the national order and safety may be secured.

In the courts of the United States, many diverse opinions have asserted that "balancing" doctrine. One of these often quoted, reads as follows:

"To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression comes. . . . The government, possessing the powers which are to be exercised for protection and security is clothed with authority to determine the occasion on which the powers shall be brought forth."

That opinion tells us that the "Government" of the United States has unlimited authority to provide for the security of the nation, as it may seem necessary and wise. It tells us, therefore that, constitutionally, the Government which has created the defenses of Political Freedom may break down those defenses. We, the People, who have enacted the First Amendment, may by agreed upon procedure modify or annul that amendment. And, since we are, as a government, a sovereign nation, I do not see how any of these assertions can

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be doubted or denied. We Americans, as a body-politic, may destroy or limit our freedom whenever we choose. But what bearing has that statement upon the authority of Congress to interfere with the provisions of the First Amendment? Congress is not the Government. It is only one of four branches to each of which The People have denied specific and limited powers as well as delegated such powers. And in the case before us, the words, "Congress shall make no law . . . abridging the freedom of speech," gives plain evidence that, so far as Congress is concerned, the power to limit our Political Freedom has been explicitly denied.

"Balancing" Security and Freedom

There is, I am sure a radical error in the theory that the task of "balancing" the conflicting claims of security and freedom has been delegated to Congress. It is the failure to recognize that the balancing in question was carefully done when, one hundred and seventy years ago, the Constitution was adopted and quickly amended. The men who wrote the text of that Constitution knew, quite as well as we do, that the program of Political Freedom is a dangerous one. They could foresee that, as the nation traveled the ways of Self-Government, the Freedom of Speech would often be used irresponsibly and unwisely, especially in times of war or near-war, and that such talking might have serious consequences for the national safety.

They knew, too, that a large section of the voting population was hostile to the forms of government which were then being adopted. And, further, they had every reason to expect that, in a changing world, new dissatisfactions would arise and might in times of stress break out into open and passionate disaffection. All these considerations, I am saying, were as clearly and as disturbingly present to their minds as they are to our minds today. And, because of them, the First Amendment might have been written, not as it is, but as the Courts of the United States have re-written it in the war-maddened years since 1919. The Amendment might have said, "Except in times and situations involving Clear and Present Danger to the national security, Congress shall make no law abridging the Freedom of Speech." Or it might have read, "Only when, in the judgment of the Legislature, the interests of order and security render such action advisable shall Congress abridge the Freedom of Speech." But the writers of the Amendment did not adopt either of these phrasings or anything like them. Perhaps a minor reason for their decision was the practical certainty that the Constitution, if presented in that form, would have failed of adoption. But more important than such questionable historical speculation are two reasons which are as valid today as they were when the Amendment was decreed.

First, our doctrine of Political Freedom is not a visionary abstraction. It is a belief which is based in long and bitter experience which is thought out by shrewd intelligence. It is the sober conviction that, in a society pledged to self-Government, it is never true that, in the long run, the security of the nation is endangered by the freedom of the people. Whatever may be the immediate gains and losses, the dangers to our safety arising from political suppression are always greater than the dangers to that safety arising from political freedom. Suppression is always foolish. Freedom is always wise. That is the faith, the experimental faith, by which we Americans have undertaken to live. If we, the citizens of today, cannot shake ourselves free from the hysteria which blinds us to that faith, there is little hope for peace and security, either at home or abroad.

Inquisition Outlawed

Second, the re-writing of the First Amendment which authorizes the Legislature to balance security against freedom denies, not merely some minor phase of the amendment, but its essential purpose and meaning. Whenever, in our Western civilization, "inquisitors" have sought to justify their acts of suppression, they have given plausibility to their claims only by appealing to the necessity of guarding the public safety. It is that appeal which the First Amendment intended, and intends, to outlaw. Speaking to the Legislature, it says, "When times of danger come upon the nation, you will be strongly tempted, and urged by popular pressures, to resort to practices of suppression such as those allowed by societies unlike our own in which men do not govern themselves. You are hereby forbidden to do so. This nation of ours intends to be free. 'Congress shall make no law . . . abridging the freedom of speech.'"

Men Do Not Like Dissent

"Human beings do not instinctively desire to live in a community where freedom of speech prevails. Instead, they long for a unified society. Even sophisticated men feel a strong exhiliration when they march in a procession which keeps perfect step with everybody singing in unison. Distaste is a common initial reaction to anybody who is very different from the general run. It is natural for us to feel hostility toward anybody who expresses unfamiliar opinions or views which we intensely dislike."

—Zechariah Chaffee, Jr., before the Hennings Inquiry

The second objection which must be met by one who asserts the unconditional Freedom of Speech rests upon the well-known fact that there are countless human situations in which, under the Constitution, this or that kind of speaking may be limited or forbidden by legislative action. Some of these cases have been listed by the courts in vague and varying ways. Thus libels, blasphemies, attacks upon public morals or private reputation have been held punishable. So, too, we are told that "counselling a murder" may be a criminal act, or "falsely shouting fire in a theatre, and causing a panic." "Offensive" or "provocative" speech has been denied legislative immunity. "Contempt of court," shown by the use of speech or by refusal to speak, may give basis for prosecution. Utterances which cause a riot or which "incite" to it may be subject to the same legal condemnation. And this listing of legitimate legislative abridgments of speech could be continued indefinitely. Their number is legion.

In view of these undoubted facts, the objection which we must now try to meet can be simply stated. In all these cases, it says, inasmuch as speaking is abridged, "exceptions" are made to the First Amendment. The Amendment is thus shown to be, in general, "open to exceptions." And from this it follows that there is no reason why a Legislature which has authority to guard the public safety should be debarred from making an "exception" when faced by the threat of national danger.

The Fallacy About "Exceptions"

Now the validity of that argument rests upon the assumed major premise that whenever, in any way, limits are set to the speaking of an individual, an "exception" is made to the First Amendment. But that premise is clearly false. It could be justified only if it were shown that the amendment intends to forbid every form of governmental control over the act of speaking. Is that its intention? Nothing could be further from the truth. May I draw an example from our own present activities in this room? You and I are here talking about Freedom within limits defined by the Senate. I am allowed to speak only because you have invited me to do so. And just now everyone else is denied that privilege. But further, you have assigned me a topic to which my remarks must be relevant. Your schedule, too, acting with generosity, fixes a time within which my remarks must be made. In a word, my speaking, though "free" in the First Amendment sense, is abridged in many ways. But your speaking, too, is controlled by rules of procedure. You may, of course, differ in opinion, from what I am saying. To that freedom there are no limits. But, unless the chairman intervenes, you are not allowed to express that difference by open speech until I have finished my reading. In a word, both you and I are under control as to what we may say and when and how we may say it. Shall we say, then, that this Conference, which studies the principle of Free Speech, is itself making "exceptions" to that principle?

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I do not think so. Speech, as a form of human action, is subject to regulation in exactly the same sense as is walking, or lighting a fire, or shooting a gun. To interpret the First Amendment as forbidding such regulation is to so misconceive its meaning as to reduce it to nonsense.

The principle here at issue was effectively, though not clearly, stated by Mr. Justice Holmes when, in the *Frohwerk* case, he said:

"The First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity to every form of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person, ever supposed that to make criminal the counselling of a murder would be an unconstitutional interference with free speech."

Those words of the great Justice, by denying that the First Amendment intends to forbid such abridgments of speech as the punishing of incitement to murder seem to me to nullify completely the supposed evidence that the amendment is "open to exceptions." They show conclusively the falsity of the "exception" theory which has been used by the courts to give basis for the "danger" theory of legislative authority to abridge our Political Freedom. If, then, the "danger" theory is to stand it must stand on its own feet. And those feet, if my earlier argument is valid, seem to be made of clay.

The Positive Meaning of The First

Mr. Chairman, in the first section of this paper I spoke of the negative fact that the First Amendment forbids the Legislature to limit the Political Freedom of the People. May I now, surveying the same ground from its positive side, discuss with you the active powers and responsibilities of free citizens, as these are described or taken for granted in the general structure of the Constitution as a whole? If I am not mistaken, we shall find here the reason why the words of the great proclamation are so absolute, so uncompromising, so resistant of modification or exception.

The purpose of the Constitution is, as we all know, to define and allocate powers for the governing of the nation. To that end, three special governing agencies are set up, and to each of them are delegated such specific powers as are needed for doing its part of the work.

Now that program rests upon a clear distinction between the political body which delegates powers and the political bodies, legislative, executive, and judicial, to which powers are delegated. It presupposes, on the one hand, a supreme governing agency to which, originally, all authority belongs. It specifies, on the other hand, subordinate agencies to which partial delegations of authority are made. What, then, is the working relation between the supreme agency and its subordinates? Only as we answer that question shall we find the positive meaning of the First Amendment.

First of all, then, what is the supreme governing agency of this nation? In its opening statement the Constitution answers that question. "We the People of the United States," it declares, "do ordain and establish this Constitution . . ." Those are revolutionary words which define the freedom which is guaranteed by the First Amendment. They mark off our government from every form of despotic polity. The legal powers of the People of the United States are not granted to them by some one else—by kings or barons or priests, by legislators or executives or judges. All political authority, whether delegated or not, belongs constitutionally, to us. If any one else has political authority, we are lending it to him. We, the People, are supreme in our own right. We are governed directly or indirectly, only by ourselves.

One Power Not Delegated

But now what have We, the People, in our establishing of the Constitution done with the powers which thus inhere in us? Some of them we have delegated. But there is one power, at least, which we have not delegated, which we have kept in our own hands, for our own direct exercise. Article I, section 2, authorizes the people, in their capacity as "electors," to choose their Representatives. And that means that We, the People, in a vital sense, do actively govern those who, by other delegated powers, govern us. In the midst of all our assigning of powers to legislative, executive, and judicial bodies, we have jealously kept for ourselves the most fundamental of all powers. It is the power of voting, of choosing—by joint action, those representatives to whom certain of our powers are entrusted. In the view of the Constitution, then, We the People, are not only the supreme agency. We are, also, politically, an active electorate—a fourth, or perhaps better, a first branch which, through its reserved power governs at the polls. That is the essential meaning of the statement that we Americans are, in actual practice, politically, a free people. Our First Amendment freedom is not merely an aspiration. It is an arrangement made by women and men who vote freely and, by voting, govern the nation. That is the responsibility, the opportunity, which the Constitution assigns to us, however slackly and negligently we may at times have exercised our power.

It follows from what has just been said that, under the Constitution, we Americans are politically free only insofar as our voting is free. But to get the full meaning of that statement we must examine more closely what men are doing when they vote, and how they do it.

The most obvious feature of activity at the polls is the choosing among candidates for office. But, under our election procedures, with their party platforms and public meetings, with the turmoil and passion of partisan debate, the voters are also considering and deciding about issues of public policy. They are thinking. As we vote we do more than elect men to represent us. We also judge the wisdom or folly of suggested measures. We plan for the welfare of the nation. Now it is these "judging" activities of the governing people which the First Amendment protects by its guarantees of freedom from legislative interference. Because, as self-governing women and men, We the People, have work to do for the general welfare, we make two demands. First, our judging of public issues, whether done separately or in groups, must be free and independent—must be our own. It

What About "Communist Front" Organizations?

"It may be argued, however, that the so-called 'Communist front organizations' present an entirely new problem because they have objectionable purposes and include objectionable persons in their membership. . . .

"The membership situation is much the same now as it has always been. Propagandist organizations are not likely to be made up of men and women with conventional ideas. . . . The organizations opposed to slavery had members who urged violations of law, such as rescuing fugitive slaves and transporting them to Canada on the Underground Railway. Some of them even favored or participated in the attempt of John Brown to start a slave-rising in Virginia. Time and again the whole labor movement has been denounced as lawless because some unionists undoubtedly engaged in violence.

"It is sometimes assumed that the moderate members of an organization always have an obligation to oust the extremists or else resign themselves. But this is by no means plain. Throughout the history of this country, the propagandist organizations which I have been describing were engaged in a hard fight against determined opponents. Their chances of winning this fight would clearly have been weakened if they had also waged an internal war with their own extremists or if moderates had got out and stopped supporting the cherished purpose of the organization. . . .

" . . . there is a tremendous temptation to make the presence of extremists the excuse for outlawing an organization when the real reason for getting rid of it is not the fear of the extremists but the hatred of the legitimate purposes."

—Zechariah Chaffee, Jr., before the Hennings Inquiry

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must be done by us and by no one else. And, second, we must be equally free and independent in expressing, at the polls, the conclusions, the beliefs, to which our judging has brought us. Censorship over our thinking, duress over our voting, are alike forbidden by the First Amendment. A legislative body, or any other body, which, in any way, practices such censorship or duress, stands in "contempt" of the sovereign people of the United States.

But, further, what more specifically, are the judging activities with which censorship and duress attempt to interfere? What are the intellectual processes by which free men govern a nation, which, therefore, must be protected from any external interference? They seem to be of three kinds.

The Mechanisms of Free Choice

First, as we try to "make up our minds" on issues which affect the general welfare, we commonly though not commonly enough, read the printed records of the thinking and believing which other men have done in relation to those issues. Those records are found in documents and newspapers, in works of art of many kinds. And all this vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation aand purpose, of information and argument, the voter may find ready to help him in making up his mind.

Second, we electors do our thinking, not only by individual reading and reflection, but also in the active associations of private or public discussion. We think together, as well as apart. And, in this field, by the group action of congenial minds, by the controversies of opposing minds, we form parties, adopt platforms, conduct campaigns, hold meetings, in order that this or that set of ideas may prevail, in order that that measure or this may be defeated.

And third, when election day finally comes, the voter, having presumably made up his mind, must now express it by his ballot. Behind the canvas curtain, alone and independent, he renders his decision. He acts as sovereign, one of the governors of his country. However slack may be our practice that, in theory, is our freedom.

What, then, as seen against this Constitutional background, is the purpose of the First Amendment, as it stands guard over our freedom? That purpose is to see to it that, in none of these three activities of judging shall the voter be robbed, by action of other, subordinate branches of the government, of the responsibility, the power, the authority, which are his under the Constitution. What shall be read? What he himself decides to read. With whom shall be associate in political advocacy? With those with whom he chooses to associate. Whom shall be oppose? Those with whom he disagrees. Shall any branch of the government attempt to control his opinions or his vote, to drive him by duress or intimidation into believing or voting this way or that? To do this is to violate the Constitution at its very source. We, the People of the United States, are self-governing. That is what our Freedom means.

Mr. Chairman, this interpretation of the First Amendment which I have tried to give is, of necessity, very abstract. May I, therefore, give some more specific examples of its meaning at this point or that?

Not The Citizen Alone

First, when we speak of the amendment as guarding the freedom to hear and to read, the principle applies, not only to the speaking or writing of our own citizens, but also to the writing or speaking of every one whom a citizen, at his own discretion, may choose to hear or to read. And this means that unhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation. The Bible, the Koran, Plato, Adam Smith, Joseph Stalin, Gandhi, may be published and read in the United States, not because they have, or had, a right to be published here, but because we, the citizen-voters, have authority, have legal power, to decide what we will read, what we will think about. With the exercise of that "reserved" power, all "delegated" powers are, by the Constitution, forbidden to interfere.

What Free Debate Means

"Now suppose that legitimate purposes of the organization on one side happen to coincide with the view of active supporters of the Soviet Union. If the government makes that fact a reason for crippling those organizations in various ways, then those on the other side will pretty much have everything their own way. Insofar as there are errors in the arguments they present, it will be very difficult for those errors to be combatted by reason when the government silences a large number of potential opponents. Thus the danger of unwise decisions on public issues is increased. What kind of a boxing match would be it where the referee was constantly tripping up one of the fighters?"

—Zechariah Chaffee, Jr., before the Hennings Inquiry

Second, in the field of public discussion, when citizens and their fellow thinkers "peaceably assemble" to listen to a speaker, whether he be American or foreign, conservative or radical, safe or dangerous, the First Amendment is not in the first instance, concerned with the "right" of the speaker to say this or that. It is concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration.

Third, the same freedom from attempts at duress is guaranteed to every citizen as he makes up his mind, chooses his party, and, finally, casts his vote. During that process, no governing body may use force upon him, may try to drive him or lure him toward this decision or that, or away from this decision or that. And for that reason, no subordinate agency of the government has authority to ask, under compulsion to answer, what a citizen's political commitments are. The question, "Are you a Republican?" or "Are you a Communist?", when accompanied by the threat of harmful or degrading consequences, if an answer is refused, or if the answer is this rather than that, is an intolerable invasion of the "reserved powers" of the governing People. And the freedom thus protected does not rest upon the Fifth Amendment "right" of one who is governed to avoid self-incrimination. It expresses the constitutional authority, the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists.

And fourth, for the same reason, our First Amendment freedom forbids that any citizen be required, under threat of penalty, to take an oath, or make an affirmation as to beliefs which he holds or rejects. Every citizen, it is true, may be required, and should be required, to pledge loyalty, and to practice loyalty, to the nation. He must agree to support the Constitution. But he may never be required to *believe* in the Constitution. His loyalty may never be tested on grounds of adherence to, or rejection of, any *belief*. Loyalty does not imply conformity of opinion. Every citizen of the United States has Constitutional authority to approve or to condemn any laws enacted by the Judiciary, any principles established by the Constitution. All these enactments which, as men who are governed, we must obey, are subject to our approval or disapproval, as we govern. With respect to all of them, we, who are free men, are sovereign. We are "The People." We govern the United States.

Mr. Chairman, I have tried to state and defend the assertion that Constitutional guarantee of Political Freedom is not "open to exceptions." Judgment upon the theoretical validity of that position I now leave in your hands.

But, as between conflicting views of the First Amendment, there is also a practical question of efficiency. May I, in closing, speaking with the tentativeness becoming to a non-lawyer, offer three suggestions as to the working basis on which decisions about Political Freedom should rest?

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First, the experience of the courts since 1919 seems to me to show that, as a procedural device for distinguishing forms of speech and writing and assembly which the amendment does protect from those which it does not protect, the "clear and present danger" test has failed to work. Its basic practical defect is that no one has been able to give it dependable, or even assignable meaning. Case by case, opinion by opinion, it has shifted back and forth with a variability of meaning which reveals its complete lack of Constitutional basis. In his opinion confirming the conviction of Eugene Dennis and others for violation of the Smith Act, Judge Learned Hand reviewed the long series of judicial attempts to give to the words "Clear and Present" a usable meaning. His conclusion reads, in part, as follows:

"The phrase 'clear and present danger' . . . is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger."

And to this bewildering interpretation of the words, "clear and present," he adds: "That is a test in whose application the utmost differences of opinion have constantly arisen, even in the Supreme Court. Obviously it would be impossible to draft a statute which should attempt to prescribe a rule for each occasion; and it follows, as we have said, either that the Act is definite enough as it stands, or that it is practically impossible to deal with such conduct in general terms."

Those words, coming from the penetrating and powerful mind of Learned Hand show how intolerable it is that the most precious, most fundamental, value in the American plan of Government should depend, for its defense, upon a phrase which, not only has no warrant in the Constitution, but has no dependable meaning, either for a man accused of crime or for the attorneys who prosecute or defend him or for the courts which judge him. That phrase does not do its work. We need to make a fresh start in our interpreting of the words which protect our Political Freedom.

Is "Advocacy" Protected?

Second, as we seek for a better test, it is, of course, true that no legal device can transform the making of decisions about Freedom into a merely routine application of an abstract principle. Self-government is a complicated business. And yet, the "no-exception" view which I have offered seems to me to promise a more stable and understandable basis for judicial decision than does the 1919 doctrine which the courts have been trying to follow. For example, the most troublesome issue which now confronts our courts, and our people, is that of the speech and writing and assembling of persons who find, or think they find, radical defects in our form of government, and who devise and advocate plans by means of which another form might be substituted for it. And the practical question is, "How far, and in what respects, is such revolutionary planning and advocacy protected by the First Amendment?"

It is, of course, understood that if such persons or groups proceed to forceful or violent action, or even to overt preparation for such action, against the government, the First Amendment offers them, in that respect, no protection. Its interest is limited to the freedom of judgment-making,—of inquiry and belief and conference and persuasion and planning and advocacy. It does not protect either overt action or incitement to such action. It is concerned only with those political activities by which, under the Constitution, free men govern themselves.

From what has just been said it follows that, so far as speech and writing are concerned, the distinction upon which the application of the First Amendment rests is that between "advocacy of action" and "incitement to action." To advocacy the amendment guarantees freedom, no matter what may be advocated. To incitement, on the other hand, the amendment guarantees nothing whatever.

This distinction was sharply drawn by Justice Brandeis when, in the *Whitney* case, he said,—

"Every denunciation of existing law tends in some measure to increase the probability that there will be violations of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."

Only Incitement Barred

Those words, I think, point the way which decisions about our Political Freedom can, and should, follow. An incitement, I take it, is an utterance so related to a specific overt act that it may be regarded and treated as a part of the doing of the act itself, if the act is done. Its control, therefore, falls within the jurisdiction of the Legislature. An advocacy, on the other hand, even up to the limit of arguing and planning for the violent overthrow of the existing form of government, is one of those opinion-forming, judgment-making expressions which free men need to utter and to hear as citizens responsible for the governing of the nation. If men are not free to ask and to answer the question, "Shall the present form of our government be maintained or changed?" If, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our Government as established by the free choice of a Self-Governing People. It is not enough to say that the People of the United States were free one hundred and seventy years ago. The First Amendment requires, simply and without equivocation, that they be Free now.

Third, and finally, if we say, as this paper has urged, that, in many situations, speech and writing and assembly may be controlled by legislative action we must also say that such control may never be based on the ground of disagreement with opinions held or expressed. No belief or advocacy may be denied freedom if, in the same situation, opposing beliefs or advocacies are granted that freedom.

If, then, on any occasion in the United States, it is allowable to say that the Constitution is a good document, it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may be likewise publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may, with equal freedom, be said that those of England or Russia or Germany are superior to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by any one, we, the voters, need to hear them. When a question of policy is "before the house," free men choose to meet it, not with their eyes shut, but with their eyes open. To be afraid, of any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged.

This text was rushed to the printer's last Monday at the close of Prof. Meiklejohn's testimony in the belief that this eloquent defense of pure "fundamentalist" American doctrine should be available for the widest possible distribution. Extra copies may be purchased in bulk orders of 1,000 or more at 5 cents a copy, and at 10 cents for lesser quantities. Every organization concerned with civil liberty ought to put a copy into the hands of every member. Please telegraph your orders.

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Capitol Roundup: Virginia Legislators Blame Gunnar Myrdal

U. S. and Soviet Journalists Find A Common Bond

The Soviet journalists got a friendly reception at the National Press Club here last week. The exchange of questions and answers wasn't very profound, but it was well calculated to provide a feeling of good fellowship, notably the prize final question from the U. S. side, "How do you fellows pad an expense account?" Most of the Soviet journalists wear their hair long and wavy, with a cowlick over their foreheads, like an earlier generation of newspapermen, who acted as if they only covered stories in order to keep themselves alive while they wrote sonnets after hours. . . .

The report last week-end of the Virginia Commission on Public Education blames the Supreme Court's school decision on "a lengthy treatise edited by Gunnar Myrdal, a European sociologist of slight experience in the United States." The report unanimously recommends amendment of the State Constitution to permit the payment of tuition in private schools so no pupil need be "integrated" against his will. . . . At the same time the members seem to feel they were very brave and "liberal" because they did not (as racist "radicals" suggested) recommend abolition of the public school system altogether.

A pleasant feature of the elections was the rout of the racist forces (described in the October 31 issue of the *Weekly*) in Arlington across the river from here. But the white liberals there, like those in South Africa, are not openly for integration; they merely want to defend the public school system and somehow "adjust" painlessly to the new court ruling. . . . Even some Southern papers seem to be shocked by the failure to indict the admitted kidnappers of Emmett Till. . . . Senator Stennis told an audience in Jackson, Miss., on November 10, Negroes should be told they must accept segregated schools or see the public school system abolished. . . . Thought U. S. Senators took an oath to uphold the laws and the Constitution?

The greatest enemies of the Negro have been his own apathy, his rich humor, his forgiving nature, his eagerness to live and be let alone. . . . But the Till case is arousing the Negro as never before, giving the minority-supported NAACP a wider base than it ever had. . . . Dr. T. R. M. Howard of Mississippi spoke before a packed Vermont Avenue Baptist church here last Sunday night and the writer asked him afterward, "In your years in Mississippi, has a white man ever helped you or secretly expressed sympathy?" The answer was "No." . . . To hear him, one of the brave men of our time, a Moses of his people, was a deeply moving experience. . . .

Trial of six persons indicted for sedition in Louisville with Carl Braden was postponed until May 14 when they appeared in court last Monday. Their cases were postponed to wait the outcome of the appeal filed by Braden from the 15-year sentence given him last December. The outcome will also be affected by the Steve Nelson case, on which the Supreme Court was hearing argument as we went to press. . . .

Henry A. Wallace's speech to the Iowa Farm Bureau Federation in Des Moines last Tuesday, his first major public address in many years, was Wallace at his best—good humored, non-partisan and refreshingly analytical after the demagogy which marks most current political discussion of the farm problem. He advocated the "soil bank" idea instead of rigid supports, i.e. Federal subsidy to take unneeded land out of production. . . . The *Weekly* bares its head at the passing of Bernard De Voto, whose famous "Easy Chair" in *Harper's* took on the FBI and many other not-so-easy liberal issues in the course of his long career. In his last, in that magazine's November issue, De Voto said he was on many subversive lists and commented, "Nomination to them is the diagnostic test of decency for everyone who has a public forum."

What Most Book Reviewers Missed

Acheson Attacks Brownell

"The Attorney General's attitude is unhappily typical of the authoritarian mind at all times and places. If the state is faced with internal danger of any sort, the response lies in repression and the secret police. It is thought that dangers rooted in ideas can be repressed as burglars are repressed. If burglars are shown to enter more often through back doors and side doors than through front doors, then arrest all who enter through back and side doors. But, one protests, this will result in the arrest principally of innocent householders. The answer recalls us sternly to the path of duty. Shall we open the doors to burglars. Those who suggest this either do not understand the problem and the danger, or they are burglars, or their apologists and dupes."

—Former Secretary of State Dean Acheson in his new book, "A Democrat Looks At His Party," satirizing Attorney General Brownell's defense of the FBI secret informant system. Acheson's discussion of "The State and the Individual" deserves respectful salute: even now, out of office, it took courage to write.

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